

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

MONDAY, THE 1ST OCTOBER 2007 / 9TH ASWINA 1929

CMA.No. 53 of 2003()

AS.297/1999 of FIRST ADDL.DISTRICT COURT, KOZHIKODE
OS.37/1993 of MUNSIFF'S COURT,KOZHIKODE-I
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APPELLANTS: RESPONDENTS/DEFENDANTS 1 & 3:

- 1. RADHA PICTURE PALACE, KOZHIKODE,
REP. BY ITS MANAGING PARTNER, P.K.MURALIKRISHNAN,
AGED 53 YEARS, S/O. LATE KERALA VARMA THAMPURAN,
NAGARAM AMSOM AND DESOM, KOZHIKODE TALUK.**
- 2. P.K.LALITHA, AGED 47 YEARS,
PARTNER, RADHA PICTURE PALACE,
D/O. LATE KERALA VARMA THAMPURAN,
RESIDING AT MALABAR HOUSE,
CHURCH LANDING ROAD, ERNAKULAM, KOCHI-16.**

**BY ADV.SRI.T.P.ARAVINDAKSHAN
SRI.K.P.SREEKUMAR**

RESPONDENTS: APPELLANTS/PLAINTIFFS & 2ND DEFENDANT:

- 1. KIZHAKKOTTIL MAMMOO HAJI, S/O. AMMED,
AGED 54 YEARS, RESIDING AT KARTHIKAPALLI AMSOM,
KURUNGALODI DESOM, VADAKARA TALUK.**
- 2. MUNDIYATT POKKAR HAJI, S/O.KUNJABDUKLLA,
AGED 54 YEARS, VILLIAPPALLI AMSOM,
MAYYANNUR DESOM, VADAKARA TALUK.**
- 3. MADATHIL SHAREEFA, D/O. MOIDU,
AGED 35 YEARS, -DO- -DO-.**
- 4. NAZREL ISLAM JUMA-ATH PALLI AND
MADRASA COMMITTEE, REP. BY ITS PRESIDENT,
KARANDOTH MOOSA HAJI, S/O.KUNJAMMED KUTTY,
AGED 59 YEARS, VILLAPPALLI AMSOM AND DESOM,
VADAKARA TALUK.**

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5. THEKKE EDAYATH AASYA,
W/O. MALAYIL MOIDU HAJI, AGED 48 YEARS,
VILLAPPALLI AMSOM, MAYYANNUR DESOM,VADAKARA TALUK.

6. DAUGHTER SHAHANAS, AGED 25 YEARS,
-DO- -DO- -DO-.

7. BROTHER NIZAR, AGED 23 YEARS,
-DO- -DO- -DO-.

8. SISTER SHAHASSEENA, AGED 19 YEARS,
-DO- -DO- -DO-.

* 9. PULLO PARAMBATH MARIYAM,
W/O. AHAMMED HAJI, AGED 89 YEARS, -DO- -DO-.(D I E D).

10. VENUGOPAL, AGED 46 YEARS,
MANAGER, RADHA PICTURE PALACE,
NAGARAM AMSOM AND DESOM, KOZHIKODE TALUK.

*IT IS RECORDED AT THE RISK OF RESPONDENTS THAT 9TH
RESPONDENT IN THIS APPEAL DIED AND AS SHE HAS NO
SUBSISTING INTEREST IN THE SUBJECT MATTERS INVOLVED
IN THIS SIT, THERE IS NO NECESSITY TO IMPEAD HER LEGAL
HEIRS, VIDE ORDER DTD. 13/06/06 IN MEMO BEARING C.F.NO.
15429/04 DTD. 19/08/04.

IT IS ALLOWED AT THE RISK OF THE PETITIONERS/APPELLANTS
THAT NO STEPS ARE TO BE TAKEN TO IMPEAD THE LEGAL
HEIRS OF THE DECEASED 9TH RESPONDENT, VIDE ORDER
DTD. 4/07/06 IN I.A.NO.1695/06.

BY ADV. SRI.T.SETHUMADHAVAN)
SRI.KODOTH PUSHPARAJAN)
SRI.K.JAYESH MOHANKUMAR) for R1 to R8

THIS CIVIL MISC. APPEAL HAVING BEEN FINALLY HEARD
ON 01/10/2007 ALONG WITH CMA NO. 55 OF 2003.
THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

Kss

ORDER ON C.M.P.NO.1268/2003 IN C.M.A.NO.53/2003

DISMISSED

01/10/2007

SD/- K.PADMANABHAN NAIR, JUDGE

/TRUE COPY/

P.A.TO JUDGE

KSS

K.PADMANABHAN NAIR, J.

C.M.A. Nos. 53 & 55 of 2003

Dated, this the 1st day of October, 2007

J U D G M E N T

CMA No. 53/2003 is filed by respondents 1 to 3 in A.S. No. 297/1999 on the file of the First Additional and District Court, Kozhikkode, which in turn arose from the judgment and decree passed in O.S. No. 37/1993 on the file of Munsiff Court, Kozhikkode. CMA No. 55/2003 is filed by the respondents in A.S. No. 298/1999, which in turn arose from the judgment and decree passed in O.S. No. 148/1993 on the file of Munsiff Court, Kozhikkode.

2. O.S.No. 148/1993 was filed by the plaintiffs for a decree of permanent prohibitory injunction. The first plaintiff was a registered partnership firm and plaintiffs 2 to 4 were partners. It was averred that the plaint A schedule property belonged to plaintiffs 2 to 4, wherein they are running a cinema theater in the name and style of M/s. Radha Picture Palace. It was also averred that the plaint schedule properties originally belonged to the Kallingal tarwad and it was outstanding on the tenancy arrangement with Smt. Bhavani Rao. The lessee assigned her right

in favour of M/s. Sait Nagjee Purushotham and Company, a partnership firm, which later on assigned the property to Shri. Jayanand Nagjee. He was in possession and enjoyment of the property. It was also averred that the jenmies had assigned their right, title and interest over the property to M/s. Basha Saheb and Company, who later on assigned their right, title and interest to M/s. Pootheri Illath Madhavan Nair and Kuttikrishnan Nair. It was averred that those assignees filed O.S. No.1499/1944 against Shri. Jayanand Nagjee and 6 others before the District Munsiff, Kozhikkode. During the pendency of the suit Shri.Kuttikrishnan Nair died and his right over the property devolved upon Shri.Madhavan Nair and he became the owner of the entire property. The suit was subsequently settled between the parties and a joint compromise petition was filed and the suit was decreed in terms of compromise. It was averred that the plaintiff's schedule property in the present suit was surrendered and possession of the same was handed over to Shri.Madhavan Nair by Shri.Jayanand Nagjee and thereafter Shri.Madhavan Nair was in possession and enjoyment of the property as its absolute owner. It was averred that as per terms and conditions of the compromise and agreement,

plaint C schedule property was agreed to be kept as a vacant plot for all times to come. It was averred that such an agreement was entered into between the parties, so as to enable the parties to use that property for the cinema theatre situated in the plaint A schedule property. It was averred that plaint C schedule property is being used as a bicycle stand and car parking area for the customers coming to the theatre. It was alleged that the defendants were tried to trespass into the property alleging that they had purchased plaint B & C schedule properties. It was contended that defendants and their predecessors have no manner of title or possession in plaint C schedule property. It is averred that defendants filed O.S.No. 37/1993 against the plaintiffs claiming right and title over plaint B and C schedule properties and after obtaining an ex parte order of injunction, they attempted to trespass into the property. Hence the plaintiffs filed O.S.No. 148/1993 for a decree of permanent prohibitory injunction restraining the defendants from trespassing upon the plaint C schedule property.

3. The defendants filed a joint written statement contending that the suit was not maintainable. The title and possession claimed by the plaintiffs were denied. It was contended

that defendants are owners of plaint C schedule property and plaintiffs have no manner of right or possession over that property. It was contended that plaint A schedule property alone was the subject matter of O.S.1499/1944 and the property scheduled in the written statement is the absolute property of the defendants. It was also contended that defendants purchased the said property scheduled in the written statement, for valid consideration without any notice regarding the agreement between the predecessors in interest of the plaintiffs and defendants on 30/09/1948. The averments in the plaint that the said plaint C schedule property is being used as a bicycle stand and car parking area and the defendants tried to trespass into the plaint C schedule property were denied. It was contended that after the purchase, the defendants had tarred the vacant land adjoining to the building in that property and thereafter the plaintiffs also tarred their property lying adjacent to the property of the defendants with an ulterior motive of claiming the right in the property. So they prayed for the dismissal of the suit.

4. O.S. No. 37/1993

This suit was filed for recovery of possession, injunction and other incidental reliefs. Initially, the suit was filed for permanent injunction alone. Subsequently, the plaint was amended incorporating the prayer for recovery of possession and also for damages for use and occupation. It was averred that the plaintiffs purchased the property as per sale deed No. 1042/1989 and got possession as per release deed No. 153/89. The building in the said property is in the possession of tenants. On the northern and eastern side of the building in the plaint schedule property there is vacant land. The property adjoining to the vacant land is the property of the first defendant and in that property the defendants are running a theatre by name M/s. Radha Picture Palace. The vacant land forming part of the plaint A schedule property lying on the northern side of the building in the plaint schedule property is having a width of 4 ½ feet. The vacant land forming part of the plaint schedule property lying on the eastern side of the building in the plaint schedule property is having a width of 30 feet. The said vacant lands were included in the title deed in favour of the plaintiffs. On the northern side of the building in the plaint schedule

property, a wicket gate was put up for access from the S.M.Street, which is situated on the western side of the said property. On the northern side of the plaint schedule property, there is a pathway for access to the theatre 'Radha Picture Palace'. The plaintiffs have also got a right of way through the aforesaid pathway and the said pathway is being used by them also. The name of the property owned by the plaintiffs is 'Kulamullakandy paramba', forming part of Kanjipura paramba, whereas the name of the property claimed by the 1st defendant is known as Mangalam paramba. It was averred that the plaintiffs had tarred the vacant plot forming part of the plaint schedule property lying on the northern and eastern side of the building in the plaint schedule property. The defendants also tarred their property lying adjacent to the tarred portion of the plaint schedule property and attempted to trespass into the plaint schedule property. Hence the suit was initially filed for injunction but subsequently the reliefs of recovery of possession and consequential injunction were also incorporated by amendment of the plaint.

5. The defendant filed a joint written statement contending that the theatre 'Radha Picture Palace' and the property situated

adjacent to the same belonged to the 1st defendant, his sister and their mother. They are also partners of a firm. The first defendant is the Managing Partner of the firm and 2nd defendant is an employee of the firm. The description of plaint schedule property is false. The title and possession claimed by the plaintiffs were denied and it was contended that plaintiffs have no right or possession over the property, which is lying on the northern and eastern side of the building owned by the defendants. The property lying on the immediate northern side of the northern wall of the building in the plain schedule property belongs to the 1st defendant, his sister and their mother. On the western side of the property of the defendants, there was a main gate and two small wicket gates. which were constructed in the year 1948 for the purpose of the theatre by Madhavan Nair, the elder brother of Shri.Kuttikrishnan Nair, who was the grand father of the first defendant. The main gate and wicket gates are now being used by the customers of the theatre and the shop buildings belonging to the first defendant and others. The vacant land laying on the eastern side of the building also belongs to the first defendant, his sister and their mother. The said property is being used by the first defendant and his

predecessors for the past several years and the same is being used as a parking area for the theatre. Neither the plaintiffs nor their predecessors have no manner of right or possession over the said property from 1948 onwards. The first defendant, his sister and their mother had got title over the vacant land comprised in T.S. 46 by the long continuous adverse possession of themselves and their predecessors in interest. It was contended that the plaintiffs obtained title and possession over the building alone. They have no manner of right or possession over any vacant land lying adjacent to the building. The averment that the defendants attempted to trespass upon the suit property was denied. The allegation that the plaintiffs tarred a portion of the plaint schedule property as averred in the plaint was denied. It was contended that it was the defendants who tarred the land and they were using that plot as a parking ground.

6. The suits were consolidated and tried jointly. Evidence was recorded in O.S. No. 37/1993. Trial court found that plaintiffs produced only Exts. A1 & A2 towards proof of their title and apart from those documents, they have not produced any other document. It was also held that the defendants in the written

statement had taken a definite contention that plaintiffs have not obtained title and possession over any portion of the property lying on the northern and eastern sides of the building in the property and further held that in view of the denial of the title by defendants, burden was on plaintiffs but they did not produce their prior title deeds. Trial court further held that the plaintiffs failed to establish their right or title over the plaint C schedule property.

7. Trial court further held that the plaintiffs in O.S. No. 37/1993 are not entitled to get recovery of possession and decree of injunction and dismissed the suit. Plea of adverse possession raised by defendants as an alternative contention was not considered on the ground that such a plea does not arise for consideration. Trial court dismissed O.S. No. 37/1993 and decreed O.S. No. 148/1993.

8. The plaintiffs in O.S.No. 37/1993 filed A.S.No. 297/1999. The defendants in O.S. No. 148/1999 filed A.S. No. 298/1999. The lower appellate court heard these two appeals together. Lower appellate court took a view that one more opportunity is to be given to the plaintiffs in O.S No. 37/1993 to produce their prior title deeds and to adduce further evidence. Accordingly, the lower appellate

court set aside the decrees and judgment passed by the trial court and remanded both the suits for fresh disposal after giving an opportunity to the plaintiffs in O.S. No. 37/1993 to prove the documents produced before the lower appellate court as well as other documents, if any. The respondents in both appeals were also given an opportunity to adduce further evidence. The Office of the lower appellate court was directed to send / transmit the documents produced by the appellants before that Court along with trial court records. Challenging the common order of remand in both appeals, the defendants in O.S No. 37/1993, who are the plaintiffs in O.S. 148/1993, have filed these two Civil Miscellaneous appeals.

9. At the time of admission of these appeals, no substantial questions of law were framed. But at the time of hearing, the following substantial questions of law were framed by this Court in both appeals.

- 1) From the facts and circumstances of the case, whether there was any necessity to remand a suit to trial court when the lower appellate court itself could have been disposed of the appeal on the evidence available on record.

- 2) Whether the lower appellate court is justified in remanding a case without specific findings as to the decree and judgment passed by the trial court are wrong.
- 3) Whether the lower appellate court can admit the evidence or without giving additional evidence under Order 41 Rule 27 and without assigning valid reasons, can set aside the decree and judgment passed by the trial court and can remand the case, so as to give an opportunity to the respondents to fill up the lacuna.

10. The appeals are heard on the questions of law framed at the time of hearing of the appeals. The learned counsel appearing for the appellants in both the Civil Miscellaneous Appeals has argued before me that the lower appellate court went wrong in remanding the cases to give an opportunity to the respondents to fill up the lacuna. It is argued that no reasons were stated by the lower appellate court for admitting the documents and in fact there was no findings by the lower appellate court that those records are to be admitted as additional evidence, but the lower appellate court directed the office only to transmit the records. The lower appellate

court directed the office to transmit the documents alone, as if those documents were already admitted as additional evidence. It is argued that the reasons stated by the lower appellate court for setting aside the decrees and judgment and remanding the case is only to give an opportunity to the plaintiffs in O.S. No. 37/1993 to fill up the lacuna. It is argued that the reasons stated for admitting those documents are illegal and unsustainable. It is also argued that the Court below had not passed any order in the petition to admit the fresh documents.

11. The learned counsel appearing for the respondents relied on the principle laid down in **K.Venkataramiah Vs. A.Seetharama Reddy & Others** (AIR 1963 1526) and argued that it is not necessary to record the reasons and the failure to mention the reasons will not be a ground to set aside the order passed by the lower appellate court. It is also argued that it is not necessary to pass a separate order in I.A. 3477/2001. It is argued that the plaintiffs in O.S. No. 37/1993 set up a rival title and the trial court failed to note that Exts.A1 & A2 itself are sufficient to prove the case of the plaintiffs in O.S. 37/93. It is argued that very valid grounds were stated in the affidavit filed in support of the petition

to admit the additional evidence. The lower appellate court considered the grounds stated in the affidavit filed in supporting the petition. It is argued though no separate order was passed the lower appellate court was of the considered opinion that those documents are essential for finally pronouncing the judgment in the case and admitted those documents in evidence. The learned counsel for the appellants submitted that the principles laid down in Venkataramiah has no application. It is pointed out that Order XLI Rule 27 of CPC was amended and Sub Rule 1(aa) was added with effect from 01/02/1977. It is argued that after the incorporation of Sub Rule 1(aa) it is mandatory that the person who files petition to adduce additional evidence in appeal has to establish the reason.

12. As already stated, O.S. No. 37/1993 was filed on 11/01/1993. The initial relief sought for in suit was a decree of injunction. Subsequently, the plaint was amended and additional reliefs of recovery of plaint B schedule property and also recovery of damages for use and occupation were incorporated. The plaint was amended as per order dated 10/03/1998. O.S. 148/1993 was filed by the defendants in the O.S. 37/1993 on 23/03/1993 for a decree of prohibitory injunction. The plaintiffs in O.S.148/93 filed a written

statement in O.S.37/93 raising the contentions which they had raised in the plaint filed by them. The defendants in O.S. 148/1993, who are the plaintiffs in O.S. 37/1993 filed a written statement reiterating the averments in the plaint filed by them. On the side of the plaintiffs in O.S. 37/1993, PW 1 was examined. Exts.A1 and A2 were proved and marked. DW1 to DW3 were examined, on the side of the defendants in that suit. Exts. B1 to B11 were proved and marked. Exts. C1 to C3 series were also marked. As already stated, the trial court dismissed O.S. 37/1993 and decreed O.S. 148/1993 by a common judgment dated 30/06/1999. Challenging the decree and judgment passed in O.S. 37/1993, A.S. 297/99 was filed on 13/12/1999 and A.S. 298/99 was filed challenging the decree and judgment passed in O.S.148/93. The plaintiffs in O.S. 37/93, who were the appellants in A.S.297/99, filed I.A. 3477/2001 in A.S.297/99 under Order 41 Rule 27 for admitting additional evidence only on 28/01/2001. It was taken on 30/11/2001 and posted to 20/12/2001. Thereafter, there were several postings and it was posted to 11/02/2002. Thereafter, the lower appellate court, did not pass any order in the I.A. The appeal came up for hearing on 20/03/2002. Thereafter,

even though there were a number of postings, the lower appellate court did not pass any separate order in I.A.3477/2001. In paragraphs 14 & 15, the lower appellate court considered the petition to admit additional evidence. It was held as follows : -

"Now the appellants in A.S. 297/99 have produced 5 documents before this court. Considering the claims forwarded from either side, this Court is of the view that an opportunity can be given to the appellants to prove the said 5 documents produced by them. It is evident that the appellants did not get sufficient opportunities before the court below to produce the prior title deeds of Exts. A1 and A2 and the necessity to produce such title deeds might not have been in the contemplation of the parties when they adduced evidence before the court below."

The trial court dismissed O.S.37/1993 on the ground that plaintiffs did not produce their prior title deeds. They have produced 5 documents before the lower appellate court. The only reason stated by the lower appellate court was that the appellants did not get sufficient opportunity. But the lower appellate court did not consider whether anyone of the grounds mentioned in order 41 Rule 27 was established in this case. The lower appellate court did not consider the reasons stated by the appellants and did not consider

whether the appellants had made out any of the ground mentioned in (a), (aa) or (b) of Rule 27 of Order XLI. Even if the contention of the respondents that it was not necessary to pass separate order in the petition, being a final court of fact, the lower appellate court ought to have considered whether the appellants had shown sufficient cause and should have stated the reasons for allowing the petition in the judgment. In this case, that was not done. The lower appellate court did not also consider whether the records are to be admitted in evidence or not but directed the Office to send those records, without allowing the petition to admit additional documents. The lower appellate court did not consider whether it is possible to dispose of the appeal itself by that court. The lower appellate court failed to note that that court can also take evidence and decide the matter finally. The lower appellate court should have at least given some reasons why it is setting aside the decree / judgment passed by the trial court. So I have no other option but to set aside the orders of remand passed by the lower appellate court in A.S. 297/99 and A.S.298/99 and direct the lower appellate court to reconsider the appeals as well as I.A.No. 3477/01 on merit and dispose of the same afresh in accordance with law. I

make it clear that I am not expressing any opinion regarding the merits on the contentions raised by both sides and the lower appellate court shall decide the entire matter afresh on merits.

13. In the result, Civil Miscellaneous Appeal Nos. 53/03 and 55/03 are allowed. The common judgment passed by the lower appellate court in A.S. Nos. 297/99 and 298/99 setting aside the decree and judgment passed in O.S.No. 33/1993 and O.S.No.148/1993 are hereby set aside. The lower appellate court is directed to take A.S. 297/99 and 298/99 back to file and dispose of the appeals and I.A.No. 3477/01 afresh in accordance with law. As the appeals are of 1999, the lower appellate court is directed to take and dispose of the appeals without further delay.

The parties shall appear in Court below on 01/11/2007.

(K.PADMANABHAN NAIR, JUDGE.)